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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 334

THE EASTERN (EMIGRANT) CHEROKEE INDIANS,
ON THE RELATION OF FLORIAN H. NASH, ET AL.,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

WILFRED HEARN,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

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No. 334

THE EASTERN (EMIGRANT) CHEROKEE INDIANS, ON THE RELATION OF FLORIAN H. NASH, JUNIOR, FRANCIS A. NASH, HENRY C. WALKLEY, RACHEL DAVIS-DRIVER, NEIL STOPLER-BRADSHAW, NANNIE R. MAYES, AND ELLEN MORGAN-FLEETWOOD,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Eastern (Emigrant) Cherokee Indians, on the relation of Florian H. Nash, Junior, and others, pray that a writ of certiorari issue to review the judgment entered in this cause on May 1, 1950, by the Court of Claims.

Opinion Below

The opinion of the Court of Claims (R. 29) is reported in 89 Fed. Supp. 1006.

Jurisdiction

The judgment of the Court of Claims sought to be reviewed was entered on May 1, 1950 (R. 29). On July 13, 1950, upon consideration of application made therefor on behalf of petitioners for extension of the time within which to file petition for writ of certiorari, Associate Justice Burton made the following order:

> "It is hereby ordered that the time for filing petition for writ of certiorari in the above-styled cause be, and the same is hereby extended to and including September 27, 1950, provided I have the statutory power to extend such time."

The jurisdiction of this court is invoked under Section 20 of the Act of August 13, 1946, 60 Stat. 1091, entitled "An Act, to create an Indian Claims Commission, to provide for the powers, duties and functions thereof, and for other purposes," and Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. Sec. 288(b).

Questions Presented

1. Whether the failure of the United States to observe the rule of partial payments in taking credit for payments made on a long overdue interest bearing account with an Indian tribe conformed to the duty to deal fairly and honorably.

2. Whether either the common law or statutory law, with respect to the liability of the United States for interest on moneys due, but withheld, which by contract bear interest, prohibits the application of the rule of partial payments.

3. Whether the Act of July 1, 1902 (32 Stat. 726), or the Act of March 3, 1919 (40 Stat. 1316), or the Act of April

25, 1932 (47 Stat. 137) conferred jurisdiction on the Court of Claims to hear and determine a claim of petitioners for losses arising from the failure of the United States to apply the rule of partial payments in making payments on account of an interest-bearing debt long past due, in the absence of treaty stipulation providing for the application of that rule.

Statutes Involved

The pertinent portions of the Act of August 13, 1946 (60 Stat. 1049), creating the Indian Claims Commission is as follows:

> "Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; *and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.*
>
> * * * * * * *

"Sec. 11. Any suit pending in the Court of Claims or the Supreme Court of the United States or which shall be filed in the Court of Claims under existing legislation, shall not be transferred to the Commission: Provided, *That the provisions of section 2 of this Act, with respect to the deduction of payments, offsets,* counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending or authorized suit in the Court of Claims has been or will be authorized: *Provided Further, That the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit.*" (Italics Supplied).

The pertinent portion of the jurisdictional Act of July 1, 1902, 32 Stat. 726, is found in Section 68 of the Act as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, *any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States,* upon which suit shall be instituted within two years after the approval of this Act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof." (Italics Supplied.)

The pertinent portion of the jurisdictional Act of March 3, 1919, 40 Stat. 1316, is as follows:

"That jurisdiction is hereby conferred upon the court of claims to hear, consider, and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United

States to the Cherokee Nation on the funds arising from the judgment of the court of claims of May eighteenth, nineteen hundred and five (Fortieth Court of Claims Reports, page two hundred and fifty-two) in favor of the Cherokee Nation. The said court is authorized, empowered, and directed to carefully examine all laws, treaties, or agreements, and especially the agreement between the United States and the Cherokee Nation of December nineteenth, eighteen hundred and ninety-one, ratified by the United States, March third, eighteen hundred and ninety-three (Twenty-seventh Statutes at Large, page six hundred and forty, chapter two hundred and nine, section ten), in any manner affecting or relating to the question of interest on said funds, as the same shall be brought to the attention of the court by the Cherokee Nation under this act. And if it shall be found that under any of the said *treaties, laws, or agreements interest on one or more of the said funds, either in whole or in part, has not been paid and is rightfully owing from the United States to the Cherokee Nation,* the court shall render final judgment therefor against the United States and in favor of the Cherokee Nation, either party to have the right to appeal to the Supreme Court of the United States as in other cases." (Italics Supplied.)

The pertinent portion of the jurisdictional Act of April 25, 1932, 47 Stat. 137, is as follows:

"That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, *to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Cherokee Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs,* which said Cherokee Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on

their merits by the Court of Claims or the Supreme Court of the United States." (Italics Supplied.)

Statement

Pursuant to the right given Indian tribes, or bands, to present claims against the United States to the Indian Claims Commission, a petition was filed with the Commission by your petitioners for the recovery of losses alleged to have been sustained by reason of the failure of the United States to observe the rule of partial payments, in taking credit for payments made on account of a long overdue, interest bearing obligation. The authority of the Indian Claims Commission to award a recovery for such losses was alleged in the petition to have been conferred upon that Commission by the provisions of clause (5) of Section (2) of the act creating the Commission which is as follows:

> * * *; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

The Indian Claims Commission dismissed the petition on motion of the United States on the ground that the claim had been formerly adjudicated on its merits. On appeal from the judgment of the Commission the Court of Claims affirmed the judgment for the following reasons:

> (a) That the action was one for the recovery of interest, and that that action had been formerly adjudicated.
>
> (b) That clause (5) of Section (2) of the act creating the Indian Claims Commission was not intended to embrace such a claim as the one presented, because the claim is not of a "fundamental character."

Your petitioners, the Eastern (Emigrant) Cherokee Indians are the Cherokee Indians who did not move to lands

lying west of the Mississippi River until after the making of the treaty between the Cherokee Nation and the United States of December 29, 1935, 7 Stat. 439. The Western (Old Settler) Cherokee Indians are the Cherokees who migrated to lands west of the Mississippi River at an earlier period pursuant to the provision of the treaty of 1817, 7 Stat. 156.

By the terms of the treaty of 1835 the Cherokee Indians ceded all their lands then lying east of the Mississippi River to the United States for a consideration of $5,000,000, from which sum certain deductions were to be made, and the remainder thereof was to be distributed *per capita* among the members of the tribe.

The validity of the treaty of 1835 was disputed by both the Eastern and Western branches of the Cherokee tribe, however, by the terms of the treaty of 1846, 9 Stat. 871, to which all branches of the tribe were parties, the cession of the lands as made in the 1835 treaty was confirmed, and the obligation to make a *per capita* distribution of the residue of the money named as a consideration for the cession was required thereunder to be distributed *per capita*. The Indians having complained that in view of the fact the residue of the purchase money had not been distributed *per capita* as agreed, interest should be paid thereon from the time said distribution should have been made. By reason of their complaint the treaty of 1846 provided that the question of interest be left for determination to the Senate of the United States. Thereafter the Senate adopted the following resolution:

> "*Resolved*, That it is the sense of the Senate that interest at the rate of 5% per annum should be allowed upon the sums found due the 'Eastern' and 'Western' Cherokees respectively, from the 12th day of June, 1838, until paid."

The Cherokees at no time agreed or consented that the disbursement of the moneys which were required by the said treaties to be paid promptly be delayed, or that the same be held as an investment.

A report of the Auditor and Comptroller of the Treasury dated December 3, 1849 showed the amount for distribution *per capita* to be $627,603.95. By acts of Congress of September 30, 1850 (9 Stat. 544) and February 27, 1851 (9 Stat. 570) Congress corrected said report and added to the amount found due therein the sum of $286,150.66, making the total $914,026.13, which amount with interest thereon was appropriated and distributed *per capita* in 1852.[1]

In the case of *United States* v. *Cherokee Nation*, 202 U. S. 101, this Court adopted findings of the Court of Claims numbered XX and XXI, wherein the Court found that the correct amount of the residue of the money which should have been distributed *per capita* was $2,025,310.93 and thereupon affirmed the determination of the Court of Claims that there remained unpaid of the principal the sum of $1,111,284.70.

Reasons for Granting the Writ

1. The Indian Claims Commission, in deciding this case on the Government's motion to dismiss the petition, concluded that the case as presented in the petition was one for consideration "by the Commission under clause (1) of Section 2 of the Act," creating the Indian Claims Commission. Clause (1) of Section 2 of the act authorizes the determination of "Claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President." On that basis the Commission held that the case had been formerly adjudicated, and

[1] See *United States* v. *Cherokee Nation*, 202 U. S. 101, 114-116.

thereupon dismissed the petition. On appeal the Court of Claims sustained the action of the Indian Claims Commission. Although the Court of Claims gave consideration to the contention of petitioners that the claim asserted came within the scope of the jurisdiction granted in clause (5) of Section (2) of the act, which authorizes the determination of "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity," its conclusions were, in substance, as follows:

> 1. The claim asserted in the petition is one for the recovery of interest and that the claim for interest had been formerly adjudicated.
>
> 2. That clause (5) of Section (2) of the act creating the Indian Claims Commission does not authorize the determination of the claim asserted because the claim is not of a "fundamental character."

With respect to the first of the Court's conclusions petitioners say that the claim asserted is not a claim for interest, but a claim for part of the principal debt which, if fair and honorable dealings had been employed by the Government, would now stand on the records as due petitioners. That such balance would bear interest has been determined by agreement of the parties. With respect to the second conclusion of the Court of Claims petitioners say that the claim based upon the failure of the Government to observe the rule of partial payments, in the circumstances of the cases, is a claim of a "fundamental character" in that such failure constitutes unfair and dishonorable dealing, which the Congress has made the foundation for relief in actions befor the Indian Claims Commission. Cf. *Sioux Tribe of Indians* v. *The United States,* 329 U. S. 684.

This is the first case in which a petition for a writ of certiorari has been presented to the Supreme Court to

review a judgment of the Court of Claims in a case appealed from the Indian Claims Commission.

If, therefore, there be error in the decision of the Court of Claims with respect to the application of the rule of *res judicata,* or in the Court's determination of the scope of the act creating the Indian Claims Commission, it is of great importance not only to the many Indian tribes who have presented, and will present, claims under the authority of that act for adjudication, but to the United States.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILFRED HEARN,
Attorney for Petitioners,
Successor to Woodson E. Norvell, Deceased.

September 27, 1950.

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BRIEF

Opinions Below

In the opinion of the Indian Claims Commission it was held that the claim asserted in the petition could be considered only as a claim authorized to be heard and determined by the Commission under clause (1) of Section (2) of the act creating the Commission, which clause provides for the determination of "claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President," and that such a claim had been formerly adjudicated.

In the opinion of the Court of Claims it was held:

(a) That the claim is for interest, and that the claim had been adjudicated;

(b) That clause (5) of Section (2) of the act creating the Indian Claims Commission did not embrace the claim because the claim was not of a "fundamental character."

Specification of Errors Which Justify the Granting of the Writ

1. The Indian Claims Commission erred in holding that the claim asserted in the petition could be considered only as a claim authorized to be adjudicated under clause (1) of section (2) of the act creating the Indian Claims Commission.

2. The Court of Claims erred in holding that the claim asserted is one for interest, and, that the claim for interest had been formerly adjudicated.

3. The Court of Claims erred in holding that clause (5) of section (2) of the act creating the Indian Claims Commission did not authorize the adjudication of petitioners'

claim because the claim was not of a "fundamental character."

Summary of Argument

1. The defense of *res judicata* is not sufficient because:

(1) No court had been authorized to determine the question here in issue;

(2) Because no court has made a determination of that issue.

The former cases were determined under the authority of jurisdictional acts which limited the authority to adjudicate claims arising out of treaties, agreements and acts of Congress. The instant case is based upon the failure of the Government to deal fairly and honorably, and it is being prosecuted under the authority of an act of Congress which authorized a recovery in a case where the Government has failed to deal fairly and honorably.

2. The conclusion of the Court of Claims that the case is one merely for the recovery of interest is not sustained by reason or precedent. The fundamental question is whether, under the circumstances of the case, the government dealt 'fairly and honorably." The interest feature of the case is purely incidental.

Argument

1. *There has not been a former adjudication of an action based upon the failure of the United States to deal fairly and honorably with your petitioners with respect to the observance of the rule of partial payments.*

In reaching the conclusion that the claim here involved had been formerly adjudicated the Court of Claims had to conclude that there was authority to adjudicate the claim on the former trials.

The jurisdictional act under which the case of *Cherokee Nation* v. *The U. S.*, 40 C. Cls. 252, 202 U. S. 101, was brought limited the jurisdiction of the Court to claims "arising under treaty stipulations."

The act authorizing the claims asserted in the case of the *Eastern or Emigrant Cherokee Indians* v. *The United States* reported in 82 C. Cls. 180 limited the jurisdiction of the Court to claims "arising or growing out of any treaty or agreement between the United States and the Cherokee Indians, or arising or growing out of any act of Congress in relation to Indian affairs."

In the case of the *Cherokee Nation* v. *The United States,* 59 C. Cls. 456, 270 U. S. 479, the jurisdictional act granted the right to recover "* * * if it shall be found that under any of *said treaties, laws, or agreements* interest on one or more of said funds, either in whole or in part has not been paid and is rightfully owing from the United States to the Cherokee Nation the Court shall render final judgment therefor * * *." (Italics supplied.)

Thus, it appears that in not one of said jurisdictional acts has authority been granted to adjudicate a claim based upon the failure of the United States to observe the fair and just rule of partial payments in taking credit for payments made on an overdue interest-bearing indebtedness. Moreover in only one of the decisions rendered in the cases prosecuted under the authority of said acts has the question with respect to the application of that rule been passed upon, or even mentioned as being an issue in the case. That was the case of *Eastern or Emigrant Cherokees* v. *The United States,* 82 C. Cls. 180. There it was contended that a proviso contained in Section 3 of the jurisdictional act authorized the Court to apply the rule of partial payments. However, the Court held that the proviso was procedural and "lays down the manner in which partial payments are

to be applied on claims sued upon which come within the jurisdiction of the court as defined in Section 1 of the Act," and that the Court had no authority to apply the rule of partial payments in the case authorized to be determined by the jurisdictional act.

Therefore, in the absence of authority granted in the jurisdictional acts under which the former cases were adjudicated to hear and determine a case predicated on moral grounds, your petitioners submit that the claim here asserted could not have been adjudicated..

The following facts with respect to the claim now asserted were established in the former decisions:

(a) By the terms of the treaty of 1835 a certain part of the consideration moving to the Indians for their cession of the lands lying east of the Mississippi River was to be distributed *per capita* to the Indians to aid them in reestablishing their homes in their new country.

(b) The amount of money which should have been so distributed was $2,025,310.83.

(c) In 1846 another treaty was entered into whereby the parties agreed that the Senate should determine whether interest should be paid on the fund which should have been distributed *per capita*. The Senate determined that said moneys should bear interest from June 18, 1838, at the rate of five per cent per annum until paid.

(d) That the 1846 treaty ratified the agreement in the treaty of 1835 that the disbursement of the per capita fund be made promptly.

(e) That in 1852 the accounting officer of the United States erroneously determined that the fund to be distributed per capita was $914,026.13 with interest thereon from June 18, 1838, that being the date the Senate held that the disbursement should have been made in accordance with the treaty obligation.

(f) That pursuant to that determination Congress appropriated the principal amount of $914,026.13 with interest thereon which was then disbursed to the Eastern Cherokee per capita, at which time the principal amount of the indebtedness was in fact $2,025,310.83 and the accrued interest thereon was approximately $1,420,000, a total of approximately $3,425,000.

(g) That no treaty, agreement or understanding between the parties had the effect of relieving the United States of the treaty obligation to make prompt distribution of the moneys which were required by said treaties to be made *per capita*.

Your petitioners feel justified in saying that had the jurisdictional act of July 1, 1902 (32 Stat. 726), under the authority of which petitioners made a recovery, authorized the Court to hear and determine a claim based upon "fair and honorable dealings" then in that case the Court could and would have applied the rule of partial payments.

It would be difficult to find a case where the application of the rule of partial payments would have greater justification than the one here presented.

In the case of *Story* v. *Livingston*, 13 Pet., 359, 371, this Court announced the rule to be as follows:

> "The correct rule in general is that the creditor shall calculate interest whenever a payment is made. To this interest the payment is first to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the principal so as to produce interest. This rule is equally applicable, whether the debt be one which expressly draws interest, or one which interest is given in the terms of damages."

The foundation of the rule is found in its fairness and justness. Therefore, in not one of the cases formerly adjudicated has the court had the authority to apply the rule

because the actions permitted to be adjudicated were required to arise out of treaty stipulations.

2. *This is not a case for the Recovery of Interest.*

That the moneys involved in this case did bear interest was determined by an agreement between the parties. The common law rule and the statutory law with respect to the liability of the United States for interest on overdue payments of moneys has no application here because there was an agreement to pay interest. To say, as it is said in the opinion of the Court of Claims, that this case is one for the recovery of interest, contradicts both fact and reason. The claim here presented is one based upon the failure of the United States to observe the rule of partial payments, because in the circumstances of the case the duty of "fair and honorable dealing" required the observance of that rule.

3. *The Claim Asserted is of a Fundamental Character.*

The Court of Claims having held that the claim here involved was one for interest and that the claim had been adjudicated, also held that the claim was not authorized to be adjudicated under clause (5) of Section (2) of the act creating the Indian Claims Commission because the claim is not of a "fundamental character" (R. 39).

It has been shown that the claim asserted has not, and could not have been, adjudicated under the authority of the former jurisdictional acts because the claim was a moral one. However, the Congress has authorized the Indian Claims Commission to adjudicate claims "based upon fair and honorable dealings." Therefore, the Congress has made the failure of the United States to deal fairly and honorably with Indian tribes the basis of claims which the Commission is authorized to adjudicate.

The narrow application given by the Court of Claims to clause (5) of Section (2) of the Indian Claims Commission act is not supported by the clear meaning of the language employed in the act or by its history. Section 11 of the act contains this proviso:

> Provided further, that the Court of Claims in any suit pending before it at the time of the approval of this act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit.

The proviso authorized the Court of Claims to determine any claim based upon "fair and honorable dealings" in a pending action no matter what the original authority of the Court with respect to the claim was, or what the subject of the action be. In the case of the *Sioux Tribe of Indians* v. *The United States* (329 U. S. 684), the Supreme Court vacated a previous order denying certiorari and granted the petition for the writ and thereupon entered the following order:

> The judgment is vacated and the case is remanded to the Court of Claims in order to enable that court to determine whether the Act of August 13, 1946, gives rise to any claims which petitioners may assert to affect the judgment theretofore entered in this cause, as to which this Court means to intimate no opinion.

Thereupon the Court of Claims, having reconsidered the case made the following finding of fact:

> On the record we find no substantial support for the view that fair and honorable dealing, within the meaning of that term as used in sections 2 and 11 of the Act of August 13, 1946, requires or justifies the conclusion that these expenditures should be charged to the Government rather than to the Plaintiff (112 C. Cls. 50, 57).

In the opinion of the Court of Claims in the instant case it is said (R. 39).

> "Clause (5) [referring to clause (5) of the act creating the Indian Claims Commission] obviously has reference to the fundamental character of the claim rather than the theory upon which an Indian tribe or band may seek to invoke the jurisdiction of the Indian Claims Commission."

If the foregoing statement was intended to mean that a claim based upon the failure of the United States to apply the rule of partial payments, under the circumstances shown in the record here was not of a fundamental character, then your petitioners submit that there is a glaring conflict between that determination and the opinion of the Supreme Court in the *Sioux* case (329 U. S. 684).

In the *Sioux* case the limitations with respect to jurisdiction were the same as in the *Cherokee* cases, but the Supreme Court remanded the case because a *fundamental issue* had arisen by reason of the provisions of the act creating the Indian Claims Commission, which authorized the determination of actions arising out of the failure of the United States to deal fairly and honorably.

Conclusion

For the reasons hereinbefore set forth your petitioners respectfully submit that their petition for the writ of certiorari should be granted.

WILFRED HEARN,
Attorney for Petitioners,
Successor to Woodson E. Norvell, Deceased.

September 27, 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 334

THE EASTERN (EMIGRANT) CHEROKEE INDIANS, ON THE RELATION OF FLORIAN H. NASH, JUNIOR, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Indian Claims Commission (R. 16-23) is not reported. The opinion of the Court of Claims (R. 29-40) is reported in 89 F. Supp. 1006.

JURISDICTION

The judgment of the Court of Claims was entered May 1, 1950 (R. 40). By order of July 13, 1950, the time for filing a petition for certiorari was extended

to September 27, 1950 (R. 40). The petition was filed on September 27, 1950. The jurisdiction of this Court rests upon 28 U. S. C. sec. 1255.[1]

QUESTION PRESENTED

Whether previous decisions of this Court and the Court of Claims pursuant to which the liability of the United States to the Cherokee Indians under a treaty of 1846 and a Senate Resolution of 1850 was determined and paid are *res judicata* of a claim filed under the Indian Claims Commission Act to recover an additional amount because of alleged use of an erroneous method of computing interest.

STATUTE INVOLVED

The relevant portion of section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U. S. C. sec. 70a, provides:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity

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[1] The Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. sec. 70s, provides in section 20(c) that determinations of questions of law by the Court of Claims shall be subject to review by this Court in the manner prescribed by section 3 of the Act of February 13, 1925, which now has been superseded by 28 U.S.C. sec. 1255. Since the Act makes no provision as to the time for filing a petition for certiorari, the general provisions of 28 U.S.C. sec. 350 would appear to be applicable.

arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

* * * * *

STATEMENT

This petition seeks review of a judgment of the Court of Claims affirming a judgment of the In-

dian Claims Commission dismissing a petition upon motion for summary judgment. The essential facts may be briefly summarized as follows:

For the purpose of settling pending claims the United States executed a treaty with the Cherokee Indians on August 6, 1846, which provided (Article 9) that a fair and just settlement be made and (Article 11) that the Senate should determine whether certain subsistence funds were chargeable to the treaty fund and what interest, if any, should be paid. 9 Stat. 871. An account prepared in 1849 showed a balance due of $627,603.95. By resolution of September 5, 1850, the Senate determined that interest should be allowed from 1838 upon sums found due the Indians. A balance due was determined and in 1852 there was disbursed $1,506,338.78. Subsequently, pursuant to a special statute, an account was rendered showing an additional $1,134,248.23 due to the Cherokees.[2] This amount was not appropriated but by Section 68 of the Act of July 1, 1902, 32 Stat. 716, 726, the Court of Claims was given jurisdiction to adjudicate any claim the Cherokees might have. Three suits brought thereunder were consolidated, resulting in a judgment determining the amount due. *Cherokee Nation* v. *United States,* 40 C. Cls. 252. This

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[2] In the meantime, as explained in the Brief in Opposition in the companion case of *The Western (Old Settlers) Cherokee Indians* v. *United States,* No. 335, claims of that band of Cherokees in relation to the matter were determined by the Court of Claims and this Court. *United States* v. *Old Settlers,* 148 U.S. 427.

judgment was, with certain modifications, affirmed by this Court, *United States* v. *Cherokee Nation,* 202 U. S. 101, and by the Acts of June 30, 1906, 34 Stat. 634, 664, and March 4, 1909, 35 Stat. 907, 938, Congress appropriated a total of $5,158,005.54, representing the principal sum of $1,134,248.23 plus interest on the several items of the judgment.

Another special jurisdictional act was passed on March 3, 1919, 40 Stat. 1316, pursuant to which the Cherokee Nation filed a further suit claiming that the principal and interest found due in 1895 should be regarded as a lump sum upon which interest should be computed at 5%, resulting in an additional claim for some $2,200,000. Rejection of this claim, *Cherokee Nation* v. *United States,* 59 C. Cls. 862, was affirmed by this Court, *Cherokee Nation* v. *United States,* 270 U.S. 476, the opinion stating that, except for the waiver of the defense by the 1919 Act, the 1906 judgment would have been *res judicata,* 270 U.S. at p. 486.

Two additional special jurisdictional acts were passed. Act of March 19, 1924, 43 Stat. 27; Act of April 25, 1932, 47 Stat. 137. In *Eastern or Emigrant Cherokees* v. *United States,* 82 C. Cls. 180, certiorari denied, 299 U.S. 551, a claim that the payments made in 1850 and thereafter should have been applied first against interest and the balance against principal was rejected on the ground that it was foreclosed by the judgment in 40 C. Cls. 252, as modified by this Court (202 U.S. 101). This same result was reached in *Western*

Cherokees v. *United States*, 82 C. Cls. 566.[3] These two cases were rested upon the 1932 Act, *supra*. At the same time, the same claim asserted under the 1924 Act was likewise rejected. *Cherokee Nation* v. *United States*, 82 C. Cls. 456.

The present petition was filed before the Indian Claims Commission seeking the same recovery upon the same method of computation as that dealt with in 82 C. Cls. 180. Compare R. 7-8 with 82 C. Cls., pages 205-206. Upon motion for summary judgment, the Commission dismissed the petition on the ground that the decision reported in 82 C. Cls. 180 was *res judicata* (R. 16-23). The Court of Claims, in affirming, agreed with this position (R. 29-40).

ARGUMENT

There can be no question that petitioners have had their day in court. The contention (Pet. 14, 18) that the claim asserted is not one for interest is unsupportable. The principal amount due to the Cherokees under the 1846 Treaty has been paid many times over and the claim for an additional amount arises only because the Senate resolution of 1850 provided for interest. The proper manner of treatment of interest and the balance due to the Indians, after considering interest and the

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[3] As explained in *Cherokee Nation* v. *United States*, 270 U.S. 476, 479, and *United States* v. *Cherokee Nation*, 202 U.S. 101, 126-129, the Western Cherokees or "Old Settlers" are those who first went to Indian Territory while the Eastern or Emigrant Cherokees moved there later.

payments that had been made, was finally determined by this Court in *United States* v. *Cherokee Nation,* 202 U.S. 101. That decision is *res judicata* of the present claim, just as it was in 82 C. Cls. 180.

The provision of the Indian Claims Commission Act waiving the statute of limitations or laches but providing that "all other defenses shall be available to the United States" makes it clear that, as the Court of Claims stated (R. 38), the Act was not intended to permit re-litigation of all the claims of Indian Tribes which had been formerly determined. Its purpose was rather to permit adjudication of claims for which no forum had previously been provided. See H. Rept. No. 1466, 79th Cong., 1st sess.; S. Rept. No. 1715, 79th Cong., 2nd sess. Clause 5 of the Indian Claims Commission Act referring to "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity," contains nothing to the contrary. Without attempting a general definition of the claims that might be embraced by that clause, it is, at least, clear that the definition is not merely one of form as petitioners seek to treat it. As the Court of Claims put it (R. 39), this clause has reference to the fundamental character of the claim rather than the theory which the petitioners urge as a measure of recovery. On petitioners' theory, the first four clauses of the Act would be surplusage because all claims could be phrased in the language of clause 5. The inapplicability of clause 5 is evi-

dent, moreover, from the fact that petitioners seek to support their present claim upon the rule of partial payments announced in *Story* v. *Livingston,* 13 Pet. 359, 371, while clause 5 refers to claims based upon fair and honorable dealings "that are not recognized by an existing rule of law or equity." As the court below pointed out (R. 39) and as this Court previously emphasized (*United States* v. *Old Settlers,* 148 U.S. 427, 478; *United States* v. *Cherokee Nation,* 202 U.S. 101, 124), interest was payable here, contrary to the general rule, only because of the terms of the treaty of 1846 and the Senate Resolution of 1850. The earlier jurisdictional acts (Pet. pp. 4-6) plainly embraced all claims based upon the 1846 Treaty and the 1850 Senate Resolution as to the manner in which the balance due to the Cherokees under those provisions should be computed, and those questions were determined. Thus, petitioners seek to use clause 5 of the Indian Claims Commission Act, not for the purpose of presenting a new claim, but merely to avoid the bar of *res judicata.* Clearly, the clause was not intended to have any such effect.

This Court's decision in *Sioux Tribe of Indians* v. *United States,* 329 U. S. 684, relied upon by petitioners (Pet. pp. 19-20), has no tendency to support their position. This Court simply remanded the *Sioux* case to determine what effect, if any, section 11 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U. S. C. sec. 70j might

have. It was thereafter held that the Act did not change the statement of the account which had been earlier determined. *Sioux Tribe of Indians* v. *United States,* 112 C. Cls. 39, certiorari denied, 337 U. S. 908. That decision is in accord with the conclusion in the instant case that the "fair and honorable dealings" provision does not justify re-opening accounts of Indian Tribes that have been judicially settled.

CONCLUSION

While this is the first petition seeking review of a decision under the Indian Claims Commission Act, it is clear that the Act was not intended to permit re-examination of claims previously litigated. The decision does not, therefore, present a question warranting review by this Court and the petition should be denied.

Respectfully submitted,

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NOVEMBER, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 917258 343